



# Asylum Policy: Religious Persecution

Presented by

**Ken Starr,  
Kimberlee Colby,  
& Thomas Farr**

## *Ting Xue v. Sessions*

No. 16-\_\_\_\_

In the  
Supreme Court of the United States

TING XUE,  
Petitioner,

v.  
JEFFERSON B. SESSIONS III,  
Respondent.

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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- For attending an unregistered house church, Xue was
  - arrested
  - beaten
  - jailed for three days and four nights
  - forced to pay a major fine
  - required to take reeducation classes, and
  - warned not to attend illegal church meetings.
- The DJ credited his testimony but denied his asylum petition, saying his fears of future persecution **"do[] not amount to more than a restriction on [his] liberty and thus do[] not rise to the level of persecution."**
- The BIA affirmed.



## The Majority View

- **Muhur v. Ashcroft**, 355 F.3d 958 (7th Cir. 2004)

**"One aim of persecuting religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining populations."**

- **Zhang v. Ashcroft**, 388 F.3d 713 (9th Cir. 2004) (per curiam)

**"to require [a Falon Gong petitioner] to practice his beliefs in secret" to "avoid persecution" is contrary to our basic principles of religious freedom and the protection of religious refugees."**

- **Kazemzadeh v. U.S. Att'y Gen.**, 577 F.3d 1341 (11th Cir. 2009)

**"having to practice religion underground to avoid punishment is itself a form of persecution."**

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## Concealing Religion to Avoid Persecution is still Religious Persecution

*Muhur v. Ashcroft*, 355 F.3d 958 (2004)

355 F.3d 958  
United States Court of Appeals,  
Seventh Circuit.

Yordana MURHUR, Petitioner,  
v.  
John ASHCROFT, Attorney General  
of the United States, Respondent.

No. 00-3395.  
Argued Dec. 3, 2003.  
Decided Jan. 10, 2004.

**Syllabus**  
Background: Applicant petitioned for review an order of the Board of Immigration Appeals (BIA) ruling that her husband following the threat of her request for asylum.

**Holding:** The Court of Appeals, **Posner**, Circuit Judge, held that an applicant is entitled to claim asylum on the basis of religious persecution even if applicant could escape the notice of the persecutors by concealing her religion.

**Position granted.**

**Attorneys and Law Firms**  
\*00. **Robert A. Lippman** (argued), **Edith J. Lee**, **Baruch Lippman**, Minneapolis, MN, for Petitioner.  
**George F. Kaurin**, Department of Homeland Security, Office of the Chief Counsel, Chicago, IL, **John C. Cunningham** (argued), Department of Justice, Washington, DC, for Respondent.

**Before:** **PLAINE**, Chief Judge, and **POSNER** and **WILLIAMS**, Circuit Judges.

**Opinion**  
**POSNER**, Circuit Judge.

Yordana Muhur asks us to set aside the order that she be removed (deported) from this country. The order followed the denial of her request for asylum. She presented evidence intended to establish the following facts. She was born to a Christian family in Egypt in 1974, at a time when it was a practice to later become and remain she was about 17 the in Akhila, the capital of Eritrea. She was in 1995. Five years later she converted to marry her, and they are (the name for the wife) of Akhila Akhila. Her husband of his marrying a Jew.

He had business dealings with her shortly after their wedding in Akhila. She was under Islamic law is a to convert to another religion. She was a Muslim wife. Instead of in the Eritrean Jews on a already integrated in the for asylum.

\*00. According to evidence that the immigration service has not challenged, Eritrean persecutors Muhur's husband, U.S. Dept. of State, Bureau of Consular Affairs, Human Rights & Labor, *Private International Religious Freedom Report 2002* (Oct. 7, 2002), <http://www.state.gov/g/drl/rls/2002/10/20021007.htm>; *International Religious Freedom Report: Ashcroft's Witness-Evidence* (2003), [http://www.jerusalem.org/religion/afra/afra\\_evidence.htm](http://www.jerusalem.org/religion/afra/afra_evidence.htm); *International Coalition for Religious Freedom, Religious Freedom: World Report* (Sept. 3, 2002), <http://www.religiousfreedom.org/conceptual/religious.htm>. It is true that in *Yefir v. Ashcroft*, 322 F.3d 477 (9th Cir. 2003), we applied a narrow reading by the Board of Immigration Appeals. But we based our ruling on the evidence in that case, and Muhur is not bound by findings of fact made in a case to which she was not a party. The government does not argue that *Yefir* controls the outcome of this case it doesn't even cite *Yefir*.

**It is "a clear error of law-that one is not entitled to claim asylum on the basis of religious persecution if . . . one can escape the notice of the persecutors by concealing one's religion."**

*Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004).



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## Pre-Constantine Rome Confirms this Principle

Muhur v. Ashcroft, 355 F.3d 958 (2004)

233 F.3d 958  
United States Court of Appeals,  
Seventh Circuit.  
Yordanos MUTHUR, Petitioner,  
v.  
John ASHCROFT, Attorney General  
of the United States, Respondent.  
No. 00-3397.  
Argued Dec. 3, 2003.  
Decided Jan. 20, 2004.

**Syllabus.**  
**Background:** Applicant petitioned for review as order of the Board of Immigration Appeals (BIA) calling for her removal following the denial of her request for asylum.

**Holding:** The Court of Appeals, **Posner**, Circuit Judge, held that an applicant is entitled to claim asylum on the basis of religious persecution even if applicant could escape the notice of the persecutors by concealing her religion.

**Position granted.**

**Attorneys and Law Firms.**  
\*\*\* **Harriet A. Ishiyama** (argued), **Edwin J. Bicknell** (supervised), Minneapolis, MN, for Petitioner.  
**George P. Kavanagh**, Department of Homeland Security, Office of the District Counsel, Chicago, IL, **John C. Cunningham** (argued), Department of Justice, Washington, DC, for Respondent.  
**Brian PLAUD**, Chief Judge, and **Posner** and **Williams**, Circuit Judges.  
**Opinion.**  
**Posner**, Circuit Judge.

Yordanos Muthur asks us to *reverse* the order that she be removed (deported) from the United States. The order followed the denial of her request for asylum. She presented evidence intended to establish the following facts: "I was born to a Christian family in Ethiopia in 1974, at a time when it was a province of Ethiopia, though of no later became and remains an independent country, she was about 17 the time with her family in Addis Ababa, the capital of Ethiopia. She became a Jehovah's Witness in 1993. Five years later she married a man to marry her, and they were married in the Kingdom (this name the Witnesses give to their place of worship). Addis Ababa. Her husband's family strongly disapproved of his marrying a Jehovah's Witness."

He had business dealings in Saudi Arabia and moved with her shortly after their marriage. His being a Jehovah's Witness in Saudi Arabia was not an offense for a Muslim to convert to another religion. So he removed them and brought his wife to abandon her faith and behavior like a Muslim wife. Instead of leaving to his riches the cause in the United States as a witness via their family had already integrated in this country and once here applied for asylum.

"\*\*\* According to evidence that the Immigration Service has not challenged, Ethiopia persecutes Jehovah's Witnesses. U.S. Dept. of State, Bureau of Democracy, Human Rights, & Labor, *2003 International Religious Freedom Report* 2002 (Oct. 7, 2002), <http://www.state.gov/g/drl/irf/2002/20021023.htm>; *International Religious Freedom Report: Jehovah's Witnesses* (2003), <http://www.jehovahs.org/refworld/rida/2003.htm>; *International Convention for the Suppression of Religious Persecution*, *Religious Freedom World Report* (June 3, 2002), <http://www.religioustolerance.org/religiousfreedom.htm>. It is true that in *Tzafra v. Ashcroft*, 232 F.3d 477 (9th Cir. 2000), we applied a country finding by the Board of Immigration Appeals. But we based our ruling on the evidence in that case, and Muthur is not bound by findings of fact made in a case to which she was not a party. The government does not argue that Tzafra controls the outcome of this case; it doesn't even cite Tzafra.

**"Christians living in the Roman Empire before Constantine made Christianity the empire's official religion faced little risk of being thrown to the lions if they practiced their religion in secret; *it doesn't follow* that Rome did not persecute Christians, or that a Christian who failed to conceal his faith would be acting 'unreasonably.'"**

Muhur, 355 F.3d at 960 (emphasis added).



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## Pre-Constantine Rome Confirms this Principle

Muhur v. Ashcroft, 355 F.3d 958 (2004)

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Yordanos MUTHUR, Petitioner,  
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**Holding:** The Court of Appeals, **Posner**, Circuit Judge, held that an applicant is entitled to claim asylum on the basis of religious persecution even if applicant could escape the notice of the persecutors by concealing her religion.

**Position granted.**

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**Opinion.**  
**Posner**, Circuit Judge.

Yordanos Muthur asks us to *reverse* the order that she be removed (deported) from this country. The order followed the denial of her request for asylum. She presented evidence intended to establish the following facts: "I was born to a Christian family in Ethiopia in 1974, at a time when it was a province of Ethiopia, though of no later became and remains an independent country, she was about 17 the time with her family in Addis Ababa, the capital of Ethiopia. She became a Jehovah's Witness in 1993. Five years later she married a man to marry her, and they were married in the Kingdom (this name the Witnesses give to their place of worship). Addis Ababa. Her husband's family strongly disapproved of his marrying a Jehovah's Witness."

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**"One aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population."**

Muhur, 355 F.3d at 961.

- The same rationale that drove pre-Constantine Rome undergirds China's policy towards Christianity and Falun Gong and is pervasive world-wide.



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## The First Amendment and the Free Exercise of Religion

**“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”**

U.S. Const., Amend. 1

### RFRA and RLUIPA Interpretation of Religious Exercise

**“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”**

42. U.S.C. § 2000cc-5 (2012)

- Both statutes **require** sincerity—thus, sham claims must be weeded out at the outset.

## DOJ AG Memo Guidance on Religious Freedom (October 6, 2017)



Office of the Attorney General  
Washington, D.C. 20530  
October 6, 2017

MEMORANDUM FOR ALL EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: Federal Law Protections for Religious Liberty

The President has instructed me to issue guidance interpreting religious liberty protections in federal law, as appropriate. Exec. Order No. 13798 § 4, 82 Fed. Reg. 21675 (May 4, 2017). Consistent with that instruction, I am issuing this memorandum and appendix to guide all administrative agencies and executive departments in the execution of federal law.

### Principles of Religious Liberty

Religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of federal law. As James Madison explained in his Memorial and Remonstrance Against Religious Assessments, the free exercise of religion "is in its nature an unalienable right" because the duty owed to one's Creator "is antecedent, both in order of time and in degree of obligation, to the claims of Civil Society."<sup>1</sup> Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice. Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming. The following twenty principles should guide administrative agencies and executive departments in carrying out this task. These principles should be understood and interpreted in light of the legal analysis set forth in the appendix to this memorandum.

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law.

Religious liberty is enshrined in the text of our Constitution and in numerous federal statutes. It encompasses the right of all Americans to exercise their religious freely, without being coerced to join an established church or to satisfy a religious test as a qualification for public office. It also encompasses the right of all Americans to express their religious beliefs, subject to the same narrow limits that apply to all forms of speech. In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right.

<sup>1</sup> James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in 3 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

**"The Free Exercise Clause protects not just the right to believe or the right to worship; it protects the right to perform or abstain from performing certain physical acts in accordance with one's beliefs."**

**Mem. at 2** (relying on RFRA).

**Directing all Departments to "vigorously enforce Federal law's robust protections for religious freedom."**

**Mem. at 1** (quoting Exec. Order 13798, the Presidential Executive Order Promoting Free Speech and Religious Liberty).

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## International Religious Freedom Act of 1998

H.R. 2431

One Hundred Fifth Congress  
of the  
United States of America  
AT THE SECOND SESSION

Passed and held at the City of Washington on Tuesday,  
the twenty-seventh day of January, one thousand nine hundred and ninety-eight

### Be It Enacted

That, to support United States foreign policy with respect to, and to strengthen United States advocacy on behalf of, individuals persecuted in foreign countries on account of religion, to authorize United States action in response to violations of religious freedom in foreign countries to establish an Ambassador at Large for International Religious Freedom within the Department of State, a Commission on International Religious Freedom, and a Special Advisor on International Religious Freedom within the National Security Council and to further purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

### SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "International Religious Freedom Act of 2002."

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title table of contents.

Sec. 2. Findings.

Sec. 3. Definitions.

TITLE I. DEPARTMENT OF STATE ACTIVITIES

Sec. 101. Office on International Religious Freedom; Ambassador at Large for International Religious Freedom.

Sec. 102. Creation of the Bureau of Religious Affairs.

Sec. 103. Creation of the Bureau of Religious Affairs.

Sec. 104. Reporting requirements with respect to religious freedom.

Sec. 105. Reporting requirements with respect to religious freedom.

Sec. 106. Reporting requirements with respect to religious freedom.

Sec. 107. Reporting requirements with respect to religious freedom.

Sec. 108. Reporting requirements with respect to religious freedom.

Sec. 109. Reporting requirements with respect to religious freedom.

Sec. 110. Reporting requirements with respect to religious freedom.

Sec. 111. Reporting requirements with respect to religious freedom.

Sec. 112. Reporting requirements with respect to religious freedom.

Sec. 113. Reporting requirements with respect to religious freedom.

Sec. 114. Reporting requirements with respect to religious freedom.

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Sec. 116. Reporting requirements with respect to religious freedom.

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Sec. 125. Reporting requirements with respect to religious freedom.

Sec. 126. Reporting requirements with respect to religious freedom.

Sec. 127. Reporting requirements with respect to religious freedom.

Sec. 128. Reporting requirements with respect to religious freedom.

Sec. 129. Reporting requirements with respect to religious freedom.

Sec. 130. Reporting requirements with respect to religious freedom.

**"Even more abhorrent, religious believers in many countries face [] severe and violent forms of religious persecution .... *In many countries, religious believers are forced to meet secretly*, and religious leaders are targeted by national security forces and hostile mobs."**

**22 U.S.C. § 6401(a)(5)** (emphasis added).

**"The term 'violations of religious freedom' means violations of the internationally recognized right to freedom of religion and religious belief and practice," "including ... (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements; (ii) speaking freely about one's religious beliefs."**

**22 U.S.C. § 6402(16).**

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## International Norms Reject the Distinction between Belief and Practice

- The United Nations has long accepted the principle that religious beliefs are not separate from religious practice.



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## International Norms Reject the Distinction between Belief and Practice



- Universal Declaration of Human Rights, art. 18 (1948):

**"Everyone has the right to freedom of ... religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."**

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## World of Faith and Freedom

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- Advancing religious freedom successfully in our foreign policy can help victims of religious persecution abroad *and* increase the security of the American people.